Wordsworth Academy *and* American Federation of Teachers, AFL-CIO, Petitioner. Case 4-RC-14161

June 25, 1982

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer David M. Spitko on May 8, 1980. At the hearing, the Hearing Officer permitted the Pennsylvania Labor Relations Board, hereinafter PLRB, to intervene and assert its position that the Employer is subject to its jurisdiction, rather than to that of the Board. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Acting Regional Director for Region 4 transferred this case to the National Labor Relations Board for decision. Thereafter, the Employer, the Petitioner, and the PLRB filed briefs.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

In February 1978, the Petitioner filed a petition in Case 4-RC-13053. That petition was dismissed on April 14, 1978, based on the Regional Director's determination that the Employer was an adjunct to the public school system, and therefore exempt from our jurisdiction. Thereafter, the Petitioner filed a petition with the PLRB seeking to represent the Employer's professional employees. The PLRB conducted an election on June 8, 1979, and, on June 2, 1980, issued a final tally of ballots which established that a majority of valid ballots had been cast for the Petitioner. On September 2, 1980, the PLRB certified the Petitioner as the representative of the employees in the following unit:

> In a subdivision of the employer unit comprised of all full-time and regular part-time professional employes including but not limited to teachers, teacher assistants, staff psychologists, social workers, art therapists, speech therapists, and career counsellors employed by Wordsworth Academy at its Main, Linfield and Wyncote subdivisions; excluding nonprofessional employes, substitute teachers, clerical employes, confidential employes, CETA employes, maintenance employes, guards and supervisors as defined in the Act.

During the pendency of the PLRB proceedings, the Employer resisted the PLRB's assertion of jurisdiction contending that the Board's decision in *National Transportation Service, Inc.*, 240 NLRB 565 (1979), indicated that the Employer was now subject to the Board's jurisdiction rather than to that of the PLRB.

On March 5, 1980, the Petitioner filed a petition with the Board in Case 4-RC-14091, seeking an election in the unit described above. The Acting Regional Director dismissed the petition on April 3, 1980, stating that a "prior valid election," within the meaning of Section 9(c)(3) of the Act, had been held within the preceding 12-month period. The Petitioner, relying on *National Transportation*, and *D. T. Watson Home For Crippled Children*, 242 NLRB 1368 (1979), filed the present petition on April 11, 1980.

At the hearing on the instant petition, the parties entered into evidence the various exhibits and transcripts generated during the hearings held by the Board and by the PLRB.

Upon the entire record in this proceeding, the Board finds:

1. The Employer is a nonprofit corporation organized under the laws of Pennsylvania with its principal office located at 2001 Pennsylvania Avenue, Fort Washington, Pennsylvania. It is engaged in providing special educational services to children who suffer from learning disabilities due to social or emotional disturbances or brain damage. During the fiscal year preceding May 1980, the Employer received gross revenue in excess of $1 million and purchased goods valued in excess of $50,000 from firms located in the Commonwealth of Pennsylvania, which in turn themselves purchased goods valued in excess of $50,000 directly from outside the Commonwealth of Pennsylvania.

Relying on its involvement with the Commonwealth of Pennsylvania, the Employer claims that it is exempt from the Board's jurisdiction. Specifically, the Employer asserts that it is exempted because it is a "political subdivision" within Section 2(2) of the Act, because it is an adjunct to the public school system, or because it does not have sufficient control over its labor relations to permit it to bargain with the Petitioner.

The Employer first claims an exemption from the jurisdiction of the Act as a "political subdivision" under Section 2(2). The exemption for political subdivisions has traditionally been limited to (1) entities that are created directly by the State, so as to constitute departments or administrative arms of the government, or (2) entities that are administered by individuals who are responsible to public officials or to the general electorate.[1] The Employ-

[1] *N.L.R.B.* v. *The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971).

er does not contend that it was created directly by the State so as to constitute a department or administrative arm of the government. Instead, the Employer argues that its administrators are "strictly responsible" to state officials, and that, accordingly, it is excluded under the second part of the test.

The facts relied on by Wordsworth to establish its exemption stem from its participation in a state educational plan for children who suffer from a learning disability. Under this plan, individual school districts are required to identify all exceptional children in their jurisdictions, diagnose their learning disabilities, and arrange for an education appropriate to those disabilities, either by establishing the courses themselves or by placing the child in an approved private school at state expense.

In the typical case, once a child is identified as handicapped, he or she is referred to an institution for evaluation of his or her skills and deficiencies. After the diagnosis is made, a personal educational program, an "individual education prescription" (IEP), is drawn up by the child's parents, representatives of the school district, and representatives of the diagnosing agency. These representatives are often teachers from one of the approved private schools. The IEP becomes the governing instrument for the education of the child, and, if the school district cannot provide the education it requires, the child is referred to an approved school offering an appropriate program.

Schools acquire approved status through procedures outlined in state regulations. Under those regulations, private schools wishing to participate in the plan submit an application for approved status to the state Department of Education (DOE). These applications must include (1) copies of all licenses, (2) a brief resume and all certifications for each administrator and faculty member, (3) the school calendar, (4) a description of transportation arrangements, (5) the school's enrollment capacity, (6) the admission criteria, (7) the tuition and fee structure, and (8) an outline of the school's educational program showing conformity with applicable special education program standards. If the application is regular on its face, and shows compliance with the State's minimum standards, such as the requisite number of school days and appropriately certified teachers, an onsite evaluation is scheduled to verify the initial acceptability of the applicant's educational services. Continuing acceptability is assured through triennial reevaluations.

The evaluators, all of whom are professional special educators, spend several days at the school, examining all aspects of the school which, in their professional judgment, are relevant to a full assessment of the program. The most critical factors, however, are the teachers' qualifications and credentials, and their ability to handle the program for the children at the school. In addition to checking teachers' academic records, special certifications, and experience, the evaluators look at their overall attitude, approach, and classroom method. Other factors, such as administrative organization of the school and the percentage of school income being spent on salaries, are considered insofar as the evaluators find that the factors have a direct impact on the classroom instruction. The State, however, plays no role in firing, disciplining, or promoting staff or faculty, setting fringe benefits or salaries, or establishing leave or grievance policies. Further, the evaluation report only identifies problems, and does not recommend or direct any specific course of action. According to the testimony of George Severns, the assistant to the director of special education in the state DOE, any pressure an administrator may feel to correct problems cited in the evaluation report "is only the pressure that the administrator may feel himself or herself." No directives issue from the State or its agencies.

In addition to the initial and triennial evaluation of the instructional program, the State conducts an annual audit of the school's expenditures to determine which expenses are related to the state-referred student's education, and are therefore reimbursable. Expenses which are attributable to the students' general health or welfare or which exceed reasonable amounts chargeable to an educational program are not reimbursed. The reimbursement is figured by totaling the charges allowed by the auditors, dividing it by the number of state-referred students, and subtracting any amounts over the statutory ceiling on reimbursement. The school never knows the amount it will receive until the money has been spent and the expenditure audited. Because no surplus is available from the reimbursements and because parents cannot be charged for "educationally related" expenses, deficits are made up by charging parents for optional services such as summer school, lunches, and field trips. The record shows that Wordsworth had always been at or above the statutory maximum for reimbursement. The 1975–76 audit shows that Wordsworth spent an average of $4,233 for nonresidential students, and $10,200 for residential students, where the statutory maximum for each was $4,100 and $8,500, respectively.

The record reveals only two direct restrictions on approved schools such as Wordsworth. First, the students accepted into the program cannot be disenrolled by the school without the approval of the local school district and the parents. If either one dissents from the school's decision, a hearing is

held to assure that the child's right to a state-funded education is protected.[2] Second, the school cannot suspend a child for more than 3 days without approval from the state DOE and notice to the local school district.

Wordsworth is a privately founded school whose president reports to its own board of directors, none of whom represent public officials or hold public office. Wordsworth has received no real estate or equipment pursuant to local, state, or Federal grants or appropriations, and makes no annual reports to the state legislature. Its students are not all state-referred, and its teachers are not eligible to participate in the state retirement plan. Although clear restrictions exist concerning expenses which are reimbursable, the school's spending is entirely within its discretion.

Although Wordsworth and the State have a close relationship, it is clear that Wordsworth has retained complete authority over its own course of action. Wordsworth decides what will be taught, when it will be taught, how it will be taught, and where it will be taught. Wordsworth hires its own administrators, staff, and faculty, and has the right to refuse to accept a student referred by the State. State standards embodied in statutes or regulations clearly have an effect on Wordsworth and other private schools; but they are no more than licensing requirements for engaging in the business of education, and for doing business with the State under its special education plan. Because Wordsworth has full authority to conduct its affairs, and is not directly responsible to public officials or the general electorate, it is not a political subdivision.

As noted earlier, the Employer argues that it is exempt from the Board's jurisdiction because it is an adjunct to the public school system, and because it does not have sufficient control over its labor relations to permit it to bargain with the Petitioner. We find, first, that the adjunct test is no longer a viable jurisdictional test, and, second, that the Employer does have sufficient control over its labor relations to permit it to bargain with the Petitioner.

In *D. T. Watson Home For Crippled Children*, 242 NLRB 1368, the employer argued that the Board should decline to assert jurisdiction over its health care facility. In support, the employer cited *Overbrook School for the Blind*, 213 NLRB 511 (1974), and *Pennsylvania School for the Deaf*, 213 NLRB 513 (1974), cases in which the Board refused to assert jurisdiction because those schools were "adjuncts" to the public school system, providing state-mandated education in satisfaction of the State's statutory obligation to provide educational opportunities to handicapped children. The Board rejected the employer's argument in *D. T. Watson*, and stated:

> [I]n *National Transportation Service, Inc.*, 240 NLRB 565 (1979), we indicated that—when ascertaining whether jurisdiction should be asserted over an employer which appears to maintain close ties to an exempt governmental entity—we shall no longer decline jurisdiction solely because of the relationship between the "purposes" of the exempt entity and the nature of the services provided to it by such an employer. Rather, for the reasons expressed therein, we decided to henceforth resolve such jurisdictional questions by first determining whether the subject employer itself meets the definition of "employer" in Section 2(2) of the Act and—if it does—then determining whether that employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization which represents them. Accordingly, to the extent that they are inconsistent herewith, the cases cited by the Employer are no longer controlling.[3]

Although *D. T. Watson* thus appeared to put the adjunct test to rest, subsequent cases seemed to indicate that it had continuing viability. See *The Krebs School Foundation, Inc.*, 243 NLRB 514 (1979), and *The New York Institute for the Education of the Blind*, 254 NLRB 664 (1981). *New York Institute* added the observation that the adjunct test may still apply "at least insofar as schools are concerned." (*Id.* at 665.)

We have examined the question and can find no reason to apply the adjunct test and thereby treat schools differently from other employers who may have close ties with an exempt entity. The adjunct test, which examines the relationship between the employer and the exempt entity, is nothing more than the intimate connection test reborn, and the same reasons which persuaded us in *National Transportation* to reject that test compel a similar result for the adjunct test. Henceforth, we shall rely on the standard announced in *National Transportation* to determine whether to assert jurisdiction over employers with close ties to an entity exempted under Section 2(2) of the Act.

Application of that standard convinces us that the Employer retains sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization. While it is

[2] If the parents feel the child's disability has not been remedied, the State will conduct a hearing to assess their contentions and determine whether state funding for a special education program should continue. The effect of this decision on Wordsworth is unclear.

[3] 242 NLRB at 1370.

true that the minimum state standards for teacher qualifications undoubtedly affect the Employer's hiring, firing, and promotion decisions, this fact does not distinguish the Employer from any other school operating in the State. Further, although the State, during its evaluation process, considers teacher qualifications and credentials, as well as the percentage of the Employer's income spent on salaries,[4] none of these considerations results in any order to the Employer to take any action. Beyond the indirect effect of these factors, the record is barren of any evidence that the State plays any role in the Employer's hiring, firing, discipline, or promotion of staff or faculty, or in resolving grievances, or setting day-to-day working conditions.

Accordingly, in view of the record as a whole, we find that the Employer's operations affect commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The parties stipulated, and we find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated to the appropriateness of a unit essentially consisting of all full-time and regular part-time professional employees, with specified exclusions, except that the Employer contends that the recent Supreme Court decision in *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980), specifically excludes its teachers, psychologists, and therapists from the coverage of the Act because they are managerial employees. In *Yeshiva*, the Supreme Court found that, because of the manner in which the University operated, members of its faculty were managerial employees excluded from the coverage of the Act. In making this determination, the Court, citing *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974), observed:

> Managerial employees are defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' ". . . These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management.
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> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[5]

Recognizing the tension between the Act's exclusion of managerial employees and its inclusion of professional employees, the Court stated that it intended no suggestion that the managerial exclusion be applied to

> . . . sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate startingg point for analysis in cases involving professionals alleged to be managerial.[6]

The record shows that, while the teachers play a significant role in the design and implementation of the Employer's special education services, this role is limited by guidelines set forth in individual stu-

[4] Although state reimbursement funds do constitute a large source of income for the Employer, Wordsworth's spending and budget allocations are completely within its own discretion.

[5] 444 U.S. at 682–683, 686.

[6] *Id.* at 690.

dents' IEPs. As noted earlier, the child's parents, representatives of the school district, and representatives of the diagnosing agency, often faculty or staff members from the approved school to which the student is likely to be referred, meet to draw up the IEP, a plan to remedy the child's learning disability. At the outset of the school year the entire faculty meets to assign students to an appropriate unit within the school.[7] These assignments are based on each student's learning needs, his or her age, and "socialization ability."[8] Each unit's supervisors and teachers then meet to consider the students' needs and plan the courses for the next semester. In the example given by Wordsworth's president, Gerald Shatz, the group would consider one subject, such as reading, first deciding how many classes this particular group of students should have. "They may decide that this group of children needs two [of] what we call redirected reading activities. One [activity] focuses on comprehension, and another on word recognition." The group then decides who will handle the activities, looking at both individual teachers' skills and desire to teach the course. Scheduling and course length are next considered so that other desired courses such as math and spelling can be arranged for the students. The process begins again for all the other courses to be taught that semester. Teaching methods to be employed are worked out during these meetings so that what is being taught in one class is not being contradicted in another, and so that matters important to the educational experience are not needlessly repeated or inadvertently omitted from the program.

Shatz testified that the supervisors attend each planning session, relay the program determinations to the administration, and play an active role in formulating the program. If a supervisor has reservations about a proposal, those reservations are disclosed and resolved at the meeting. Shatz indicated that supervisors and teachers usually arrive at a consensus and rarely disagree on matters concerning the program because the supervisors are well advised and will approve the teachers' decisions if the decisions fit within health and safety requirements and can reasonably be done. If unresolvable differences arose, Shatz testified that he "[didn't] think the teachers would prevail in it."

The teachers also collectively and individually select the materials to be used in the courses. They examine what the school has and decide whether to use those materials or order additional ones. Apparently any reasonable request for materials will be honored to the extent that there are funds available in the budget. Requests for materials or equipment must be given by the teachers to the supervisors who must approve the request and pass it along to the administration. Shatz testified that teachers may requisition desks, for example, saying "I've got bigger children." Teachers fill out a requisition form, which is signed by an administrator and sent to a purchasing agent who processes the request. Shatz stated that, if the administrator had not signed off, the request would not go anywhere.

Teachers carefully monitor each student's progress and development. Individual teachers decide whether a student is capable of moving on to the next lesson in day-to-day work, while all the student's teachers determine whether the student is able to move into the next instructional level. The benchmark for this decision, as is true of all the faculty's decisions concerning the student's educational program, is the student's IEP, and in particular the goals it sets forth. If a student has met or exceeded those goals, the student is placed in the next instructional level. If the goals have not been met, the teachers may decide the goals were somehow inappropriate for the student, and that they should be modified. When questioned whether the decision to move a student into the next instructional level is analogous to the decision to promote a student in a conventional school into the next grade, Shatz testfied that it is not, and stated, without providing detail, that there may be no applicable analogy.

In addition to deciding who is to be promoted, the student's teachers also decide when it is time for a student to graduate or to move out of the more isolated program offered by Wordsworth into a regular school program. In making these decisions, they are again guided by the goals and objectives stated in the student's IEP, and consider the student's age, number of years at Wordsworth, and level of reading skill attainment. As increasing numbers of students with more severe learning disabilities have entered the school, the teachers have reviewed the general criteria considered in deciding whether a student should be graduated or mainstreamed, and have modified them to reflect the needs of the changing student population. The record does not indicate when or how such modifications occur.

Regarding matriculation, Shatz testified that "the teachers have some . . . say as to when the child should disenroll, not necessarily when the child should enroll." He added that after diagnosing the child's educational needs and drawing up the IEP, the "teacher could [say] . . . 'But we don't think

[7] The school has five units, two in the upper school and two in the lower school. The other unit is apparently located at the Wyncote facility.

[8] The record does not contain a definition for the term "socialization ability."

we can be of any help to this child'" if in their view Wordsworth would not be of any assistance, but "most often" the usual state-referral system operates.

The record reveals that nonsupervisory faculty at Wordsworth have no part in decisions concerning hiring, firing, promotion, or discharge of faculty members or any other employees at the institution.[9] All such matters are decided by the administration unaided by the nonsupervisory staff or faculty. In addition to deciding these crucial questions, the administration also sets the school calendar; determines the teachers' hours, requiring them to arrive at 8:30 a.m. and remain until 4 p.m.; and decides how many periods a day they will be required to teach.

While it is true that the faculty[10] at Wordsworth exercise considerable discretion in some matters, this discretion does not extend beyond the routine performance of the tasks to which they have been assigned. The teachers, working with the supervisors and guided by the goals set forth in the IEP, estimate the students' needs, design a suitable educational program, and coordinate the details associated with completing those tasks. They examine the students' qualifications and disabilities and place them in an appropriate unit of the school; design courses suited to the needs of the students in the units; select appropriate teachers, times, and educational materials; assess student performance; and determine the proper direction for the students' future educational experience. The total package is geared toward one narrow goal–remedying particular learning disabilities. The teachers act solely as professional special educators in creating and implementing this educational package.

Thus, unlike *Yeshiva*, the teachers at Wordsworth do not make recommendations to the administration in cases of faculty hiring, tenure, sabbaticals, termination, and promotion. Nor is it true that the teachers make final decisions regarding the admission and expulsion of individual students. The teachers offer their professional opinion as to whether the school can "help the child," but this is not in any way binding on the administration. While the faculty at *Yeshiva University* "decided questions involving teaching loads, student absence policies, tuition and enrollment levels . . ."[11] the record reveals no role in these matters for the teachers at Wordsworth. Also, unlike the faculty in *Yeshiva*, the teachers at Wordsworth work jointly with supervisory personnel to decide on the academic content of the school's educational program, and make the decisions under the guidelines established by the IEP. Thus, the Employer's teachers play a diminished role in "determin[ing] . . . the product to be produced," and play no role in determining the "terms upon which [the product] will be offered, and the customers who will be served."[12] They are clearly no more than professional employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned.

In light of the foregoing, we find that the teachers, psychologists, and therapists are statutory employees, and that the following unit is appropriate:

> All full-time and regular part-time professional employees including, but not limiting [sic] to, teachers, teaching assistants, staff psychologists, social workers, art therapists, speech therapists and career counselors employed by the Employer at its main Linfield and Wyncote subdivisions, excluding all other employees, including non-professional employees, substitute teachers, clerical employees, CETA employees, Title One employees, nurses, maintenance employees, teaching aides, guards and supervisors as defined in the Act.

Accordingly, we shall direct an election in the above-described unit.[13]

[Direction of Election and *Excelsior* footnote omitted from publication.]

CHAIRMAN VAN DE WATER and MEMBER HUNTER, dissenting:

Contrary to our colleagues in the majority, we would decline to assert jurisdiction over the Employer in this case, and would dismiss the petition.

[9] While the physical education department does select employees to act as coaches and officials at games, this action is closer to making teaching assignments than it is to "hiring" as contended by the Employer. Further, the physical education faculty's recommendation of a wage scale for the faculty members undertaking these extra duties is not enough by itself to warrant excluding them as managerial employees.

[10] The record contains no evidence that the psychologists and therapists act beyond the scope of their routine professional duties. Testimony reveals only that they treat the students and advise the teachers regarding convenient times to schedule classes, so that they can arrange their appointments to meet particular students. Accordingly, we find no basis on which to conclude that these employees are managerial.

[11] 444 U.S. at 677.

[12] *Id.* at 686.

[13] As noted earlier, the PLRB certified a unit similar to the one here sought. The Board's established policy is to accord comity to the elections and certifications of responsible state government agencies, provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements. Further, while the state agency's unit determination need not conform to Board precedent, the unit must not be repugnant to the Act. *Allegheny General Hospital*, 230 NLRB 945 (1977). We decline to grant comity in this case because the unit certified by the PLRB differs from the unit here sought by the parties. The PLRB certified unit includes all professional employees, and does not expressly exclude nurses, Title I employees, or teaching aides. However, the stipulated unit expressly excludes nurses, Title I employees, and teaching aides. Further, the parties stipulated to exclude certain named employees who may or may not be covered by the PLRB certification.

In our view, the appropriate test for asserting jurisdiction over an employer such as this is the "intimate connection" test abandoned by the Board in *National Transportation Service, Inc.*, 240 NLRB 565 (1979). It is clear that the Employer, who participates in the State's educational program for exceptional children, is acting as an arm of the State in fulfilling the State's statutory duty to provide all its citizens with the opportunity for an education. In that capacity, the Employer is so interrelated with the State that it shares the State's exempt status. The Employer is subject to extensive and exacting regulations regarding, among other things, its faculty, curriculum, and physical facilities. Failure to meet these standards would result in the loss of approved status and a concommitant loss of State funds which constitute the major portion of the Employer's income.

We agree with the dissenters in *National Transportation, supra* at 566:

> In determining that certain types of enterprises are not "employers" within the meaning of the Act, Congress necessarily concluded that subjecting such entities to the strictures of the statute would not effectuate national labor policy. It follows that it would also not be in the best national interest for this Board to assert jurisdiction over employers who, although not by definition excluded from the Act's coverage, are nonetheless so closely related to exempt entities that the policy considerations underlying the latters' exemption also apply to them.

Accordingly, because application of the "intimate connection" test convinces us that the majority's assertion of jurisdiction in this case is incorrect, we respectfully dissent.